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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 283

ROSEMARY [illegible]OSS,

Petitioner,

v.

ILSE KILIANI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

ARTHUR G. WARNER
and
JAMES E. BIRDSALL,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the HONORABLE FRED M. VINSON, *Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Petitioner respectfully prays that a writ of certiorari be issued to review the final order of the Court of Appeals of the State of New York, entered on May 26, 1949 (p. 42), dismissing an appeal by the petitioner from a final order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on the 21st day of March, 1949 (pp. 25-26), dismissing an appeal from a final order of the Supreme Court of the State of New York, Westchester County, entered on the 16th day of February, 1949 (pp. 3-4).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 *U. S. C. A.* §344).

Questions Presented.

The questions presented for review by this Court are:

1. Does compelling petitioner to submit to trial on a criminal charge before a trial judge who has already prejudged both the law and the facts and who has already formed opinion highly prejudicial to the petitioner, deny to petitioner her rights under the Fourteenth Amendment to the Constitution of the United States?

2. Does a law of the State of New York forbidding petitioner to appeal on constitutional grounds, from an order of the Supreme Court of the State of New York, requiring her to submit to trial on a criminal charge before a prejudiced trial judge, deny to petitioner her rights under the Fourteenth Amendment to the Constitution of the United States?

Statutes Involved.

The relevant portions of the pertinent statutory provisions are set forth in the Appendix to this petition.

Statement of Facts.

On November 24, 1948, petitioner Rosemary Cross was accused in a complaint, filed by respondent Ilse Kiliani, in the Police Court in the Village of North Tarrytown, Westchester County, New York, of Assault in the Third Degree in violation of Section 244 of the Penal Law of the State of New York (p. 6).

The alleged assault had purportedly occurred on November 23, 1948 under the following circumstances: One Roger Thiele and his wife were then and had been on unfriendly terms. The couple had two children, Karen Thiele, age 6, and Christopher Thiele, age 1. The two children were, at the time of the assault, in the house with respondent Ilse Kiliani, their nursemaid, who refused to permit their mother to take the children with her (p. 6).

Since, on that date, no order had been made by any Court granting the custody of such children to either the father or the mother, each of them was entitled, under Sec. 81 of the Domestic Relations Law of the State of New York, to the care and custody of said children.

On that date, petitioner accompanied Mrs. Thiele to assist her in regaining custody of her children (p. 6).

According to respondent's own story, when she attempted to detain the children with intent to keep them from their mother (who, under the law, had the lawful care and custody thereof), petitioner is alleged to have restrained the respondent so that the mother could regain her own children (pp. 6, 14). Under Sec. 1250, subd. 2 of the Penal Law of the State of New York, Mrs. Kiliani, in thus attempting to keep the children from their mother, might well be found to be guilty of a very serious criminal offense.

The following day respondent filed a complaint with Patrick J. Powers, Police Justice in said Village of North Tarrytown charging petitioner with assult in the third degree. Petitioner absolutely denies such charge (pp. 6, 9).

Patrick J. Powers is the only Judge in the said Police Court of North Tarrytown. The petitioner objected to being tried before Judge Powers because he had already made statements in this case which indicated that he had prejudged both the facts and the law and had already formed opinions, so prejudicial to petitioner, that she cannot obtain a fair and impartial trial (p. 9).

The facts concerning the prejudice and prejudgment by Justice Powers are set forth in the affidavit of petitioner (pp. 9-10).

When the case was called before Judge Powers, he stated publicly that, as a result of his examination of the respondent, he knew that she was the victim of an assault. Of course, deponent absolutely denies that the respondent was the victim of an assault (p. 9).

Again, on January 22, 1949, Judge Powers made the following statement in Court:

> "This woman (Ilse Kiliani) was not detaining the child from her mother. As I understand it, she (Ilse Kiliani) was the guardian of that child while Mr. Thiele was not in the house. She was the nurse or nursemaid, or whatever you call it, and, therefore, she had every right to see that the children were there in her custody and under her protection" (p. 10).

In the opposing affidavits respondent does not deny that Judge Powers made those statements (pp. 13-19). Clearly, the Trial Judge has already decided in his own mind the two principal issues of law and fact involved in this case, both adversely to petitioner.

The Trial Judge has already formed the definite opinion that the respondent was the victim of an assault, although petitioner absolutely denies that charge. Secondly, the Trial Judge has already formed the opinion that the respondent was justified in withholding the children from their mother who was their lawful custodian, although the petitioner contends that her whole course of conduct was completely proper, but that the action of respondent herself constituted a grave violation of the Penal Law.

Under these circumstances the bias of the Trial Judge is so marked that petitioner cannot obtain a fair trial before him.

Accordingly, petitioner moved in the Supreme Court of the State of New York, County of Westchester, for an order, pursuant to Section 57 of the Code of Criminal Procedure of the State of New York, declaring that it is reasonable that the charge herein be prosecuted by indictment. The purpose of obtaining the certificate was to enable the charge against petitioner to be tried in the County Court of the County of Westchester instead of before the Police Justice in the Village of North Tarrytown.

Petitioner's application was denied by an order of the Supreme Court of the State of New York, dated February 16, 1949 (pp. 3 to 4). In its opinion (pp. 20-21) denying the application, the Court said on this point only:

> "Upon this application it does not appear • • • that deponent may not receive a fair and impartial trial." (p. 20)

Petitioner then appealed to the Appellate Division which dismissed her appeal by an order (pp. 25-26), dated March 21, 1949, on the ground "that the order is not appealable" (p. 27).

Petitioner then appealed to the Court of Appeals of the State of New York from said order of dismissal. That appeal was dismissed by an order of the Court of Appeals dated May 26, 1949 (p. 42), granting respondent's motion which had pointed out that the order denying the application was not appealable (p. 30). Petitioner now appeals to this Court for a writ of certiorari to review the determination of the Court of Appeals.

Because of the situation and record of the petitioner, this charge is of particularly grave importance to her. Petitioner Rosemary Cross is a young lady, 27 years old, of impeccable reputation. She had never been arrested for nor charged with any criminal offense nor had she ever been indicted for nor convicted of any crime (p. 12). Her career, considering her age, is outstanding. She entered the United States Navy in 1949 with the rank of Midshipman; she was commissioned an Ensign on January 28, 1943; she thereafter attained the rank of Lieutenant in the United States Navy and received an honorable discharge in February, 1946; she presently holds the rank of Lieutenant Senior Grade in the United States Naval Reserve. Since her discharge from the Navy she has earned her living acting as a confidential secretary: she was employed in that capacity by Mrs. James E. Forrestal, the wife of the former Secretary of National Defense, and she was employed as a confidential secretary by Mr. Laurence Ely, the father of

Mrs. Roger Thiele, the mother of the two children above mentioned (p. 11).

A conviction of the crime with which she is charged in said complaint would jeopardize petitioner's commission as a Lieutenant in the United States Naval Reserve, would bar her from a permanent career as an officer in the Navy, and would make it impossible for her to obtain employment in the future as a confidential secretary to anyone to whom such conviction were disclosed (p. 12).

The manner in which petitioner raised, in the Courts below, the Federal questions sought to be reviewed.

In the Supreme Court of the State of New York, County of Westchester, petitioner, in her affidavit submitted in support of her application, stated that to compel her to submit to trial before the Police Justice in the Village of North Tarrytown would deprive her of her rights and privileges under the Constitution of the United States (12). The Supreme Court Justice said nothing on the point except inferentially by stating that it did not appear that petitioner may not receive a fair and impartial trial. (pp. 20-21)

On the appeal to the Appellate Division, Second Judicial Department, respondent pointed out, in Point V of her Brief submitted on said appeal, that the principal basis for her appeal was that the denial of the certificate by the Court below had deprived her of her constitutional privileges under the Fourteenth Amendment to the United States Constitution. The Appellate Division *per curiam* opinion stated nothing on the point.

In the Court of Appeals of the State of New York, ~~respondent~~ petitioner pointed out in her affidavit in opposition to the respondent's motion to dismiss the appeal, that compelling petitioner to be tried before the Police Justice of North Tarrytown who was a prejudiced judge would be a deprivation of her constitutional rights in violation of the Constitution of the United States (p. 36). The Court of Appeals

wrote no opinion, but, like the other State courts, denied petitioner the relief she sought.

Reasons for Granting the Writ.

The questions involved in this case are substantial, involving the rights of persons under the Fourteenth Amendment to the Constitution of the United States. These questions, so far as research by counsel has been able to discover, have never been passed upon by this Court.

I.

The first question involved in this case is whether a person may be compelled to stand trial on a criminal charge before a judge whose prejudice against the defendant is already known to exist.

There is no substantial dispute as to what is involved in this controversy. The petitioner is charged with having committed an assault by assisting a mother to regain the custody of her children to which she was entitled. The assault is alleged to have been committed against a person who, petitioner contends, unlawfully attempted to keep the children from their mother.

The Trial Judge has already, publicly and clearly, stated that he considers that the respondent was the victim of an assault and that she had the right to keep the children from their mother. He has thus already decided the two issues of law and fact involved in this case and decided them both against the petitioner.

There was no denial in the papers submitted to the State Supreme Court Justice who, on the merits, denied the application for the certificate, that the Trial Judge had already expressed his opinion both that the respondent had been assaulted and that she had the right to keep the children from their mother.

Under these circumstances, compelling the petitioner to stand trial on this criminal charge before this biased judge is highly prejudicial and destructive of her rights under the Fourteenth Amendment.

It is, of course, not open to question that the conviction of a person before a biased judge is an unconstitutional deprivation of his rights.

However, this Court has never passed upon the question of whether a person may be compelled to stand trial on a criminal charge before a biased judge.

A criminal trial is fundamentally different from a civil proceeding. The trial itself, regardless of its outcome, involves constitutional questions, such as, the protection against self-incrimination, and other rights, which would be endangered in a criminal trial before a biased judge.

Moreover, there would not seem to be any valid constitutional or logical reason for compelling petitioner to submit to a trial before a judge whose bias has been clearly shown. The vice of the situation is aggravated by the fact that the petitioner's position is such that a conviction, even if subsequently reversed, could forever destroy her established reputation causing her substantial property damage (pp. 11-12).

The question of whether petitioner may be compelled to stand trial on a criminal charge before a biased judge is a Federal question; it involves the construction of the Fourteenth Amendment to the Constitution of the United States; it is a novel question and has not been previously decided by this Court; it is a matter of substantial importance and should be passed upon by this Court.

II.

The second issue in this case involves the constitutionality of the New York State laws forbidding an appeal to be taken on constitutional grounds from an order denying the granting of a certificate that a criminal charge be prosecuted by indictment.

The denial of the certificate, by compelling petitioner to be tried before a prejudiced judge, deprived her of her constitutional rights.

Yet, even though the facts establishing prejudice were undenied, petitioner had no way of having the matter

reviewed so that she is being compelled to submit to trial before the biased judge.

The New York State courts have held that Section 517 of the Code of Criminal Procedure of the State of New York limits the right of appeal solely to appeals from final judgments. Such a limitation deprives a defendant of his opportunity to escape the oppressive consequences of a criminal trial before a biased judge. It is respectfully submitted that constitutes a deprivation of due process.

Petitioner does not contend that all intermediate orders in criminal proceedings must be made appealable. On the other hand, petitioner does contend that where a constitutional right is denied by an intermediate order and such denial cannot be wholly rectified by an appeal from the final judgment, then the denial of the intermediate order must itself be appealable. This Court has never, so far as counsel has been able to ascertain, passed upon this question.

The issue involved is a substantial one; it affects constitutional rights depending upon the interpretation of the Fourteenth Amendment to the United States Constitution, and should be passed upon by this Court.

Conclusion.

For the foregoing reasons it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

ARTHUR G. WARNER,
and
JAMES E. BIRDSALL,
Attorneys for Petitioner.

Appendix.

A.

The relevant provisions of Section 244 of the *Penal Law* of the State of New York.

"§244. Assault in third degree.

A person who: 1. Commits an assault, or an assault and battery, not such as is specified in sections two hundred and forty and two hundred and forty-two, * * * is guilty of assault in the third degree."

B.

Section 245 of the *Penal Law* of the State of New York.

"§245. Punishment for assault in third degree.

Assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both."

C.

Section 57 of the *Code of Criminal Procedure* of the State of New York.

§57. Exclusive jurisdiction.

"Upon filing with the magistrate, before whom is pending a charge for any of the crimes specified in section fifty-six, a certificate of the county judge of the county, or of any justice of the supreme court, that it is reasonable that such charge be prosecuted by indictment, and fixing the sum in which the defendant shall give bail to appear before the grand jury; and upon the defendant giving bail, as specified in the certificate, all proceedings before the magistrate shall be stayed; and he shall, within five days thereafter, make a return to the district attorney of the county of all pro-

ceedings had before him upon the charge, together with such certificate and the undertaking given by the defendant thereon; and the district attorney shall present such charge to the grand jury; provided, however, that no such certificate shall be given except upon at least three days' notice to the complainant or to the district attorney of the county of the time and place for the application therefor."

D.

The relevant portion of Section 81 of the *Domestic Relations Law* of the State of New York.

"§ 81. Appointment of guardians by parent

A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them."

E.

The relevant portion of Section 1250 (Subd. 2) of the *Penal Law* of the State of New York.

"§ 1250. Kidnapping defined

A person who wilfully: .....

2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child;

* * * * * *

Is guilty of kidnapping, which is a felony and is punishable, if a parent of the person kidnapped, by imprisonment for not more than ten years and, if a person other than a parent of the person kidnapped, by death."

F.

Section 517 of the *Code* of *Criminal Procedure* of the State of New York.

"§ 517. In what cases appeal may be taken by defendant

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals, and upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred and eighty-five, may be reviewed. For every purpose of an appeal herein, a conviction shall be deemed a final judgment, although sentence has been or may hereafter be suspended by the court in which the trial was had, or otherwise suspended or stayed, and the supreme court upon such an appeal may review all decisions of the court upon a motion for a new trial, or in arrest of judgment. A judgment of affirmance upon any such appeal shall not operate to exclude any appellant, otherwise entitled thereto, from the right of suffrage."

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ILSE KILIANI,
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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This brief is respectfully submitted in opposition to the petition filed by the petitioner herein for writ of certiorari to review the final order of the Court of Appeals of the State of New York, entered on May 26, 1949, dismissing an appeal by the petitioner from a final order of the Appellate Division of the Supreme Court of the State of New York, Second Department, entered on March 21, 1949, dismissing an appeal from an order of the Supreme Court of the State of New York, Westchester County, entered on February 16, 1949.

The petitioner describes the aforesaid order of the Supreme Court, Westchester County as "final". It is respectfully submitted that petitioner misconceived the nature of said order; it is not "final", but intermediate. No trial has been had of the petitioner under the information filed by the respondent, and the order of the Supreme Court, Westchester County, referred to, merely denied the application of the petitioner that the proceedings be presented to the Grand Jury. The appeals by the petitioner first to the Appellate Division and then to the Court of Appeals, were each dismissed because in the State of New York, no appeal lies from an intermediate order in a criminal action but only from judgment of conviction or final orders.

Jurisdiction

The petitioner invokes the jurisdiction of the Court under Section 237 of the Judicial Code, as amended, and cites it as 38 U. S. C. A., § 344. This, of course, is the old Section of the Code which formerly regulated the rights and procedure for a writ of certiorari. We assume that under the revision, effective September 1, 1948, the petitioner invokes 28 U. S. C. A. §§ 1257, 2101.

Statement of Facts

The respondent was employed by Roger H. Thiele, for over five years as nurse to the children of himself and Mrs. Thiele (p. 14).* At the time of the alleged assault on November 23, 1948, one of the children was aged six and the other child was aged one. Prior to November 23, 1948, and on January 12, 1948, Mrs. Thiele had abandoned Mr.

*Reference to page numbers in parenthesis, are to page numbers of the papers on appeal filed in the Court of Appeals, and the papers submitted to the Court of Appeals on the motion to dismiss the appeal.

Thiele, leaving the children with him, and respondent since that time had been taking care of them for Mr. Thiele (p. 14).

On November 23, 1948, both children were home ill with colds and under the care of a doctor. After obtaining entrance to the house, through an intermediary's stratagem, the respondent was assaulted by the petitioner, who rushed into the house accompanied by Mrs. Thiele, Mrs. Thiele's mother and two men. Although the respondent protested and told the petitioner and the others that the children were sick and should not be taken out of the house, the children were snatched from their beds and taken out into waiting cars. The respondent was violently pulled by the petitioner and held and bruised while the children were being removed from the premises (p. 14).

On November 24, 1948, respondent filed a complaint with Patrick J. Powers, Police Justice in the Village of North Tarrytown, County of Westchester, State of New York, charging the petitioner with assault in the third degree (p. 13). Assault in the third degree, under the Penal Law of the State of New York, is a misdemeanor (§§ 245, 2, 2181, 2182, Penal Law).

On December 4, 1948, the petitioner appeared in Court, accompanied by her attorneys and requested an adjournment. Judge Powers granted the adjournment until December 18, 1948 (p. 18). Upon the return date, petitioner again requested an adjournment so that her attorneys might secure a deposition from Mrs. Thiele, who, in the meantime, had fled to the Barbados, British West Indies, with the children. Judge Powers again granted the adjournment and the matter was put over to January 8, 1949.

On January 8, 1949, the respondent was ill and unable to attend Court and the case was adjourned until January 22, 1949.

On January 22, 1949, Judge Powers informed the petitioner of her rights under §§ 6, 57 and 58 of the Code of

Criminal Procedure, under which the application to the Supreme Court, Westchester County, was later made, and an adjournment was granted by Judge Powers until February 15, 1949 for the purpose of making the application (pp. 18-19).

On January 28, 1949, an application was made to the Supreme Court, Westchester County for an order granting a certificate that the charge against the petitioner be prosecuted by indictment (p. 13). The application was supported by various contentions (p. 7). The application came before Mr. Justice James W. Bailey, at Special Term, Part I, in the Supreme Court, Westchester County, and Mr. Justice Bailey in an opinion which carefully discussed the facts and contentions of the petitioner, denied the application (p. 20). An order was entered denying the application (p. 3).

Thereafter, the petitioner filed a notice of appeal in the Appellate Division of the Supreme Court, Second Department from the order of Mr. Justice Bailey (p. 2). The appeal was argued before the Appellate Division, Second Department and the Appellate Division held that the order was not appealable and dismissed the appeal. The determination of the Appellate Division was based on the case of *People* v. *LeTang*, 273 App. Div. 811, and case cited therein (p. 27). The case cited by the Appellate Division was *People* v. *Mascola*, 174 App. Div. 360.

In that case, the defendant was charged with a violation of the Liquor Tax Law, a misdemeanor. He moved for a certificate that the charge should be prosecuted by indictment and the application was denied. The Court dismissed the appeal on the ground that the order denying the application was not appealable, stating in part as follows (at 361, 362):

> "The law cited, pursuant to which the application was made, does not provide for the entry of an order

denying the application. It contains no provision for appeal except that a defendant may appeal from a judgment or determination of the Court of Special Sessions in the same manner as an appeal may be taken from a judgment in an action prosecuted by an indictment, and it is prescribed that the jurisdiction of appellate courts shall be the same as from such a judgment of conviction after indictment. (Laws of 1910, chap. 659, § 40.) * * * Now it is settled that unless an appeal in a criminal case is authorized by statute it is not authorized at all. (People v. Zerillo, supra; People v. Grout, No. 1, supra; Matter of Montgomery, 126 App. Div. 72; appeal dismissed, 193 N. Y. 659.)

Recantation is imperative. An intermediate appeal may not be taken, and this appeal must be dismissed."

An order was entered in the Appellate Division, Second Department, dismissing the appeal (p. 25). The petitioner filed a notice of appeal to the Court of Appeals from the order of the Appellate Division. The notice of appeal expressly stated that it was taken "as of right" (p. 23). The respondent moved to dismiss the appeal on the ground that it had not been taken by permission and could not be taken as of right and that the right of appeal in criminal cases is purely statutory and is not a constitutional right (p. 28). Upon argument in the Court of Appeals, upon respondent's motion, the Court of Appeals granted the motion and dismissed the appeal (p. 42).

Respondent Denies Prejudice by Trial Judge

The petitioner claims that the trial judge has already pre-judged both the law and the facts. The respondent denies that the trial judge made any statement in any form or manner whatsoever prejudicial to the petitioner, and that Judge Powers definitely did not make any state-

ment that he knew the respondent was the victim of an assault.

The petitioner makes the claim that there was no denial in the papers submitted to the State Supreme Court Justice. The respondent wishes to point out to the Court, that an affidavit was submitted to the State Supreme Court containing statements denying that the trial judge had prejudged the law and the facts of the case. The affidavit of respondent containing said statements, is set forth on page 16. Respondent states therein, "The applicant then makes the startling charge that she cannot obtain a fair and impartial trial before Judge Powers. It is my belief that Judge Powers has not formed any judgment on this case. As a matter of fact, it was he who, as the applicant states, informed the applicant of her rights under Sections 57 and 58 of the Code of Criminal Procedure. * * *"

A further denial was contained in the affidavit of J. Robert Bleakley, sworn to the 29th day of April, 1949, which affidavit is set forth in the papers on appeal filed in the Court of Appeals by respondent on the motion to dismiss the appeal. The affidavit is set forth on page 40 in the folder containing the papers filed in the Court of Appeals on said motion. The affidavit of J. Robert Bleakley contained the statement, "That your deponent was present in the Court Room in the Village of Tarrytown at the time the statement was alleged to have been made by the Hon. Patrick J. Powers, and states that following the granting of an adjournment in this matter, the attorney for the appellant called upon his own stenographer seated in the middle of the Court Room to arise and attempt to read back, verbatim, the statements of Judge Powers. That your deponent states that no statement was ever made by Judge Powers that he believed that the complainant was the victim of an assault. * * *"

The respondent points out to the Court the fact that, not only have numerous adjournments been granted to the

petitioner herein to carry through the appeals, but further that the petitioner herein was not required by Judge Powers to obtain a stay in order to bring the petition for the writ of certiorari. That respondent wishes to point out to the Court that the charge was filed on November 24, 1948, and that approximately *one year* will have elapsed before this matter is brought to trial. The numerous adjournments granted by Judge Powers certainly does not evince any prejudice toward petitioner.

Questions Alleged to be Presented for Review

On page 2 of the petition of the petitioner, two questions are claimed to be presented for review by this Court. Under analysis it is clear that these questions are so framed by the petitioner that they present statements of a fact situation which do not, in truth, exist. Thus the first question assumes as a "fact" that the trial judge has already pre-judged both the law and the fact. The fact is that this is not the case as our foregoing statement clearly shows. Moreover, such question assumes that petitioner has, by the proceedings in the Courts of New York State, been compelled to submit to a trial. The fact is otherwise. All that petitioner has so far attempted to do, is to have her case presented to the Grand Jury. There has been no trial, and upon the trial, or by proper proceedings prior to the trial, the petitioner can adequately protect her rights, if any exist.

The second question attempts to imply that the Law of the State of New York cited by the petitioner, "forbids" petitioner an appeal on constitutional grounds. That is not the fact. The law of New York does not forbid an appeal; it merely does not provide for an appeal from an intermediate order of the character which petitioner sought to obtain in the Courts of New York. We shall, however, demonstrate at a point beyond, that there is no constitutional right to appeal from an intermediate order in a criminal action.

Reasons Why the Writ Should Not be Granted

First: There is no constitutional right to an appeal from an intermediate order in a criminal action. It has been held many times that the right of review in criminal cases by an Appellate Court is not an element of due process. *District of Columbia* v. *Clawans,* 300 U. S. 617; *Errington* v. *Hudspeth,* 104 F. (2d) 384, cert. den. 310 U. S. 638; *Applebam* v. *United States,* 274 F. 43, cert. den. 256 U. S. 704; *U. S. ex rel. Mason* v. *Hunt,* 16 Fed. Supp. 285.

The right of review under Federal Law as in New York Law is entirely dependent upon statute. The right of review is not a natural, inherent or fixed right, but may be granted or withheld by the legislature in its wisdom. *People* v. *Gersewitz,* 294 N. Y. 163, 326 U. S. 687; *People* v. *Zerillo,* 200 N. Y. 443; *McKane* v. *Durston,* 153 U. S. 684.

In *McKane* v. *Durston,* this Court said (at 687):

> "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case * * * was not at common law and is not now a necessary element of due process of law."

Here there is not even a *final* judgment involved, but merely an intermediate order in the action. In *People* v. *Gersewitz, supra,* a motion was made to the Court in which a conviction was had to vacate its own judgment and to discharge the defendant from custody thereunder or to grant a new trial. The defendant invoked the power of the Court upon the ground that his constitutional right had been infringed. The Court denied the application and the defendant took an appeal. An appeal to the Appellate Division from the order of the lower court denying the application was made, but was dismissed by the Appellate

Division. The defendant then appealed to the Court of Appeals from this decision and in a clear and positive opinion by Chief Judge Lehman, the Court of Appeals unanimously affirmed the Appellate Division. In part, Chief Judge Lehman said (at 168-169):

> "By motion to the court, in which a conviction was had, to vacate its own judgment and to discharge a defendant from custody thereunder or to grant a new trial, the defendant invokes the power of the court to vindicate the defendant's constitutional rights in the criminal prosecution. Such a motion is not a 'special proceeding' as defined by the Civil Practice Act but is made in the criminal action, and an order made upon such a motion is an 'intermediate order' from which an appeal may be taken only if a right to review of the order is established by the Code of Criminal Procedure. Argument that the omission of the Legislature to provide for an appeal from such an order was inadvertent and that the omission should be supplied may be persuasive; but such arguments must be addressed to the Legislature. The court has not power to supply even an inadvertent omission of the Legislature."

We respectfully submit that this opinion of the Court of Appeals affirmed by this Court, is the complete answer to the contentions of the defendant.

Second: The law in New York is thoroughly settled that an order denying a defendant's application for a certificate that the defendant be tried by indictment is not appealable. Cases supporting this proposition are many and clear in point. *People* v. *LeTang,* 273 App. Div. 811; *People* v. *Warner,* 232 App. Div. 843; *People* v. *Mascola,* 174 App. Div. 360; *People* v. *Sanger,* 168 App. Div. 135; *People* v. *Heckart,* 20 N. Y. S. 2d, 988 (not officially reported).

Third: The petitioner is amply protected by the right of review from any judgment of conviction.

The petitioner entirely overlooks the right vouchsafed to her to appeal from any judgment of conviction which might be rendered against her upon a trial. The New York statutes clearly grant an appeal to the petitioner in such an event and at that time any ground that she may urge for reversal by reason of the actions of the trial court may be at length considered by an Appellate Court. Consequently, there is no point to her contention that her rights will be irrevocably lost unless review is granted by this Court.

We, of course, do not in this brief, attempt to set forth the many considerations of policy which might be submitted on behalf of the determination of the Legislature of the State of New York that, in general, intermediate orders in a criminal case should not be subject to an appeal. It is enough, we believe, to indicate that petitioner's constitutional rights have not been invaded, and are, indeed, protected by the existing procedure under New York Law.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the petition for a writ of certiorari be denied.

Respectfully submitted,

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